

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC, a Delaware
limited liability company; CAROLINE
RECORDS, INC., a New York Corporation;
VIRGIN RECORDS AMERICA, INC., a
California Corporation,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, a Delaware
Limited Liability Company; CONNECTED
VENTURES, LLC, a Delaware Limited
Liability Company, and DOES 1-20, inclusive,

Defendants.

EMI BLACKWOOD MUSIC, INC., a
Connecticut Corporation; EMI APRIL MUSIC,
INC., a Connecticut Corporation; EMI VIRGIN
MUSIC, INC., a New York Corporation;
COLGEMS-EMI MUSIC, INC., a Delaware
Corporation; EMI VIRGIN SONGS, INC., a
New York Corporation; EMI GOLD
HORIZON MUSIC CORP., a New York
Corporation; EMI U CATALOG, INC., a New
York Corporation; EMI UNART CATALOG
INC., a New York Corporation; JOBETE
MUSIC CO., INC., a Michigan Corporation;
and STONE DIAMOND MUSIC
CORPORATION, a Michigan Corporation,

Plaintiffs,

v.

VIMEO, LLC d/b/a VIMEO.COM, a Delaware
Limited Liability Company; CONNECTED
VENTURES, LLC, a Delaware Limited
Liability Company, and DOES 1-20, inclusive,

Defendants.

CASE NOS. 09 CV 10101 (RA)
09 CV 10105 (RA)

**DECLARATION OF ELLIS HOROWITZ,
PH.D. (1) IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT, AND (2) IN OPPOSITION
TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

I, Professor Ellis Horowitz, the undersigned, hereby declare as follows:

1. My name is Ellis Horowitz. I am a Professor of Computer Science and Electrical Engineering at the University of Southern California (“USC”) and a past Chair of USC’s Computer Science Department. I have substantial experience with the computer science and Internet-related principles discussed in this declaration. I know all of the following facts of my own personal knowledge and could, if called and sworn as a witness, testify competently to this declaration’s contents.

2. I was retained on behalf of Plaintiffs in this matter in 2010 to render my professional opinion regarding the operation of the website located at www.vimeo.com (the “Vimeo Website”) and regarding the techniques used by Vimeo to manage the content made available via the Vimeo Website and the composition of the Vimeo user base. On or about January 7, 2011, I submitted an Expert Report in connection with these topics, and it is my understanding that this Expert Report was provided to Defendants in this action on or about January 10, 2011, pursuant to which my deposition was taken by Defendants on March 7, 2011. A true and correct copy of my Expert Report (including two amended exhibits provided at my deposition) is attached hereto as Exhibit A, and is incorporated herein by reference as though set forth in full.

3. My area of specialization for more than 10 years has been software development on the World Wide Web. I have held a variety of other positions in both industry and academia, and am the author or co-author of over ten books and over eighty journal articles and refereed conference proceedings articles. Published decisions where my expert testimony has been accepted include *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 435 (S.D.N.Y. 2011), *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409 (S.D.N.Y. 2009), *Columbia*

Pictures Indus., Inc. v. Fung, No. CV 06-55678, 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009), and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197 (C.D. Cal. 2007). A more complete account of my professional qualifications can be found in my attached Expert Report, at ¶¶ 1-7, and in the curriculum vitae attached as Exhibit A thereto.

4. As set forth more fully in my report, it is my professional opinion that Vimeo exercises a striking degree of control over, and monitoring of, the contents of the Vimeo Website and its users through a variety of techniques and procedures of a sort not evidenced in any other major website featuring so-called “user-generated content.” Additionally, it is my conclusion that Vimeo has selectively not extended such monitoring and control to the use of copyrighted music, and has chosen not to employ easily implemented “filtering” technologies routinely used by other such websites. Instead, Vimeo has accepted and even encouraged the use of copyrighted music, including through technical measures, and has placed advertising on its pages (including pages featuring copyrighted music) that is keyed to these pages’ content. Finally, it is my professional opinion that Vimeo’s putative method for identifying and terminating “repeat infringers” was severely deficient in several respects.

5. Since the preparation of the attached Expert Report, I have reviewed the Vimeo Website, and I have not encountered any additional information that would change the conclusions in my report.

6. Since the filing of my report it has also come to my attention that Vimeo continues to make available content for download that has been purportedly disabled pursuant to Plaintiffs’ claims in this action or to DMCA notices by third parties. A chart reflecting examples of web pages from Vimeo “Groups” offering such videos for download is attached hereto as Exhibit B. I have personally confirmed that videos can be downloaded from such pages on the

Vimeo Website, and have also analyzed the programming code underlying these pages. From doing so I was able to confirm that, as suggested by the URLs themselves, the videos offered for download on these pages reflect the same "clip ID" (and hence the same uploaded video) as the video purportedly removed by Vimeo, whose primary page can be seen at the URL consisting of "http://vimeo.com/" followed by the ID number. These primary pages state that Vimeo has "removed or disabled access to" the video in question. Although Vimeo appears to have disabled the streaming of videos from "Group" pages containing a noticed video, it has not disabled the specific "Group" pages themselves, nor has it disabled the downloading of videos from these pages where downloading was formerly available. As a result, anyone who travels to the URL of such pages continues to be offered the video for downloading by Vimeo.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Los Angeles, California this 9 day of October, 2012.



Professor Ellis Horowitz